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# Petrolium Nasional Bhd (Petronas) v Khairulniza bt Md Yasin & Ors

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12B-648 OF 2011
SURAYA OTHMAN J
19 JUNE 2013

*Contract — Agreement — Loan agreement — Studying loan — Offer letter to be read with loan agreement — Requirement that borrower must take employment for lender for seven years to convert study loan into scholarship — Borrower's employment terminated — Whether loan remained loan — Whether loan agreement breached — Whether claim by lender barred by limitation — Whether lender had proven that amount claimed was disbursed for benefit of borrower*

The appellant ('Petronas') had offered the first respondent ('Cik Khairulniza') a study loan to further her studies in the United Kingdom. Cik Khairulniza accepted the offer and a loan agreement between Petronas and Cik Khairulniza as the borrower and the second and third respondents as guarantors, were signed. Clause 15 of the loan agreement stated that the letter of offer was to be read together with the loan agreement and that it formed part of the said agreement. Clause 3(b) essentially stated that if required by Petronas, Cik Khairulniza must take employment or serve with Petronas or any of its approved agency for a period of seven years, after which event, the study loan would then be converted into a scholarship. After completion of her studies, Petronas offered Cik Khairulniza employment, on a trial basis or on probation of six months and her employment was further extended for another three months. Upon expiry of the extended probationary period, Petronas alleged that Cik Khairulniza's performance was found to be still unsatisfactory and did not confirm her in her position. Petronas then had to terminate Cik Khairulniza's services. Cik Khairulniza then filed a claim for reinstatement at the Industrial Court and her claim was dismissed. The Industrial Court Chairman found that Cik Khairulniza was guilty of poor work performance during her probation and extended probationary period and as such Petronas was justified in not confirming her as she was found to be unsuitable or unfit for such confirmation. Petronas then filed a claim against Cik Khairulniza and her two guarantors in the sessions court for not fulfilling cl 3(b) of the letter of offer, which was to repay the loan disbursed for her studies. The claim was dismissed by the sessions court. In the present appeal, Petronas maintained that the study loan agreement entered into between parties was a loan agreement and that it would only be converted into a scholarship once Cik Khairulniza had served seven years with Petronas. Since Cik Khairulniza's employment was

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terminated, the loan remained a loan. The issues that arose for determination were whether Cik Khairulniza had breached cl 3 of the loan agreement; whether the claim by Petronas was barred by limitation; whether Petronas had proven that the amount claimed was disbursed for the benefit of Cik Khairulniza.

**Held**, allowing the appeal:

(1) Clause 3(b) of the letter of offer was to be read together with cl 3 of the loan agreement as stipulated by cl 15 of the agreement. It was clear that by not completing her seven years service to Petronas, she had clearly breached cl 3(b) of the offer letter. It could not make sense that just because an employer required an employee to work for seven years to convert her loan into a scholarship, the employer could not terminate the employee's service for poor performance. The requirement was for Cik Khairulniza to serve Petronas for seven years but that she did not or could not do (see paras 25 & 30).

(2) Cik Khairulniza brought a claim for wrongful dismissal against Petronas in the Industrial Court. The Industrial Court found Cik Khairulniza to be guilty of poor work performance during her probation and extended probationary period and as such Petronas was justified in not confirming her in her position as she was found to be unsuitable and unfit for confirmation and consequently had to be dismissed. The termination was held to be valid and Cik Khairulniza did not appeal against that decision (see para 30).

(3) When Petronas employed Cik Khairulniza, Petronas had essentially postponed Cik Khairulniza's obligation to repay her loan under cl 3 of the agreement. When she was not confirmed in her position in Petronas due to poor work performance and consequently terminated on 2 November 1999, she could not complete the seven years service required of her to convert the loan into a scholarship. At this point of time, the breach occurred and the repayment of the loan became due under cl 3 of the agreement. Therefore, the six years limitation period should commence on 2 November 1999 and end six years later on 1 November 2005. Since Petronas's claim was filed on 27 October 2005, it was still within time and not barred by the six years limitation. Thus, the claim by Petronas was not barred by limitation (see para 40).

(4) Cik Khairulniza had admitted that Petronas paid for her studies and for her maintenance in the United Kingdom. The sessions court judge had agreed during trial that the said document be tendered as evidence, subject to the weight to be attached being determined after the trial. Petronas had proven that the amount claimed was disbursed for the benefit of Cik Khairulniza (see para 41).

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(5) Although the decision of the sessions court judge was partly correct when he found the Cik Khairulniza and the guarantors to be in breach of the loan agreement; he erred when he found Petronas's claim to be time-barred and the amount disbursed by Petronas for the benefit of Cik Khairulniza were not proven. Petronas had proven its claim on the balance of probabilities (see para 42).

**[Bahasa Malaysia summary**

Perayu ('Petronas') telah menawarkan responden pertama ('Cik Kahirulniza') pinjaman pelajaran untuk melanjutkan pelajarannya di United Kingdom. Cik Khairulniza telah menerima tawaran itu dan satu perjanjian pinjaman antara Petronas dan Cik Khairulniza sebagai peminjam dan responden-responden kedua dan ketiga sebagai penjamin-penjamin, telah ditandatangani. Klausa 15 perjanjian pinjaman menyatakan bahawa surat tawaran perlu dibaca bersama perjanjian pinjaman dan ia membentuk sebahagian daripada perjanjian tersebut. Klausa 3(b) terutamanya menyatakan bahawa jika diperlukan oleh Petronas, Cik Khairulniza hendaklah bekerja atau berkhidmat dengan Petronas atau mana-mana agensi yang diluluskannya untuk tenpoh tujuh tahun, yang mana selepas itu, pinjaman pelajaran itu akan ditukar kepada biasiswa. Selepas menamatkan pengajiannya, Petronas telah menawarkan Cik Khairulniza pekerjaan, atas dasar percubaan atau enam bulan tempoh percubaan dan pekerjaannya telah dilanjutkan untuk tiga bulan lagi. Selepas tamat tempoh percubaan lanjutan itu, Petronas mengatakan prestasi Cik Khairulniza didapati masih tidak memuaskan dan tidak mengesahkan jawatannya. Petronas kemudian terpaksa menamatkan perkhidmatan Cik Khairulniza. Cik Khairulniza kemudian telah memfailkan tuntutan untuk pengembalian jawatan di Mahkamah Perusahaan dan tuntutannya telah ditolak. Pengerusi Mahkamah Perusahaan mendapati bahawa Cik Khairulniza bersalah kerana prestasi kerja yang lemah semasa tempoh percubaannya dan tempoh percubaan lanjutannya dan oleh itu Petronas bertindak wajar untuk tidak mengesahkannya kerana dia didapati tidak sesuai atau tidak layak untuk pengesahan tersebut. Petronas kemudian telah memfailkan tuntutan terhadap Cik Khairulniza dan dua penjaminnya di mahkamah sesyen kerana tidak memenuhi klausa 3(b) surat tawaran itu, yang mana adalah untuk membayar balik pinjaman yang diberikan untuk pengajiannya. Tuntutan itu telah ditolak oleh mahkamah sesyen. Dalam rayuan ini, Petronas menegaskan bahawa perjanjian pinjaman pelajaran yang dimasuki antara pihak-pihak adalah perjanjian pinjaman dan bahawa ia hanya akan ditukar kepada biasiswa jika Cik Khairulniza telah berkhidmat selama tujuh tahun dengan Petronas. Oleh kerana pekerjaan Cik Khairulniza telah ditamatkan, pinjaman masih suatu pinjaman. Isu-isu yang timbul untuk penentuan adalah sama ada Cik Khairulniza telah melanggar klausa 3 perjanjian pinjaman; sama ada tuntutan oleh Petronas terbatas oleh had masa; sama ada Petronas telah membuktikan jumlah yang dituntut telah dibayar untuk faedah Cik Khairulniza.

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**Diputuskan**, membenarkan rayuan: A

(1) Klausa 3(b) surat tawaran hendaklah dibaca bersama dengan klausa 3 perjanjian pinjaman sebagaimana ditetapkan oleh klausa 15 perjanjian. Adalah jelas bahawa dengan tidak melengkapkan perkhidmatan tujuh tahun di Petronas, dia jelas telah melanggar klausa 3(b) surat tawaran. Ia B tidak masuk akal di mana hanya kerana majikan mengkehendaki seorang pekerja itu bekerja selama tujuh tahun untuk menukar pinjamannya kepada biasiswa, majikan itu tidak boleh menamatkan perkhidmatan pekerja kerana prestasi lemah. Keperluan itu adalah untuk Cik Khairulniza berkhidmat dengan Petronas selama tujuh tahun tetapi dia C tidak atau tidak dapat berbuat demikian (lihat perenggan 25 & 30).

(2) Cik Khairulniza telah memulakan tuntutan kerana pemecatan yang salah terhadap Petronas di Mahkamah Perusahaan. Mahkamah Perusahaan mendapati Cik Khairulniza bersalah kerana prestasi kerja yang lemah D dalam tempoh percubaan dan tempoh percubaan lanjutannya dan oleh itu Petronas adalah wajar kerana tidak mengesahkan jawatannya kerana dia didapati tidak sesuai dan tidak layak untuk pengesahan dan berikutan itu telah dipecat. Pemberhentian itu diputuskan sebagai sah dan Cik Khairulniza tidak merayu terhadap keputusan tersebut (lihat perenggan E 30).

(3) Apabila Petronas mengambil Cik Khairulniza untuk bekerja, Petronas telah pada dasarnya menangguhkan tanggungjawab Cik Khairulniza untuk membayar balik pinjamannya di bawah klausa 3 perjanjian. Apabila dia tidak disahkan jawatannya di Petronas kerana prestasi kerja F lemah dan berikutan diberhentikan pada 2 November 1999, dia tidak dapat melengkapkan perkhidmatan tujuh tahun yang diperlukan untuk menukar pinjaman itu kepada biasiswa. Pada masa ini, pelanggaran telah berlaku dan bayaran balik pinjaman itu perlu dibayar di bawah klausa 3 perjanjian. Oleh itu, tempoh had masa enam tahun hendaklah bermula G pada 2 November 1999 dan berakhir enam tahun kemudian pada 1 November 2005. Oleh kerana tuntutan Petronas telah difailkan pada 27 Oktober 2005, ia masih dalam tempoh masa dan tidak dihadkan oleh had masa enam tahun itu. Justeru, tuntutan oleh Petronas tidak terbatas oleh had masa (lihat perenggan 40). H

(4) Cik Khairulniza telah mengakui bahawa Petronas telah membayar untuk pengajiannya dan untuk penyenggaraannya di United Kingdom. Hakim mahkamah sesyen telah bersetuju semasa perbicaraan bahawa dokumen tersebut dikemukakan sebagai keterangan, tertakluk kepada beban yang I terdapat bersama untuk ditentukan selepas perbicaraan. Petronas telah membuktikan bahawa jumlah yang dituntut telah dibayar untuk faedah Cik Khairulniza (lihat perenggan 41).

(5) Walaupun keputusan hakim mahkamah sesyen sebahagiannya betul

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apabila beliau mendapati Cik Khairulniza dan penjamin-penjaminnya melanggar perjanjian pinjaman; beliau terkhilaf apabila mendapati tuntutan Petronas telah luput masa dan jumlah yang dibayar oleh Petronas untuk faedah Cik Khairulniza tidak dibuktikan. Petronas telah membuktikan tuntutannya atas imbangan kebarangkalian (lihat perenggan 42). ]

**Notes**

For cases on agreement in general, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2944–3004.

**Cases referred to**

*AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 848, CA (refd)

*Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248, HC (refd)

*Nasri v Mesah* [1971] 1 MLJ 32, FC (refd)

*Ong Kim Hai v Kusaini bin Surip* [1984] 2 MLJ 285; [1984] 1 CLJ 310 (Rep); [1984] 2 CLJ 281, FC (refd)

*Ramamurthi a/l Ramani v Sri Ram & Co (sued as a firm)* [1998] 2 MLJ 744, CA (refd)

*Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71, FC (refd)

*Sime Hok Sdn Bhd v Soh Poh Sheng* [2009] MLJU 774; [2009] 9 CLJ 848, HC (refd)

*Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124, FC (refd)

**Legislation referred to**

Limitation Act 1953 s 6, 6(1)(a)

**Appeal from:** Summons No 2–52–4403 of 2005 (Sessions Court, Shah Alam)

*Harikanan Ragavan (Jayadeep Hari & Jamil) for the plaintiff/appellant.*
*Maidzura Mohammed (Raja Daryl & Loh) for the defendant/respondent.*

**Suraya Othman J:**

INTRODUCTION

**[1]** Petrolium Nasional Bhd ('Petronas') who is the plaintiff in the sessions court brought a claim against the defendants for the repayment of a loan given under a study agreement to the first defendant, Cik Khairulniza Md Yasin to further her studies in GCE A Levels and a degree course in the United Kingdom. The first defendant is a student and the borrower of the loan while the second and third defendants are guarantors to the loan. The plaintiff alleged that Cik Khairulniza Md Yasin has breached the loan agreement when

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she failed to perform her work satisfactorily which resulted in her employment with Petronas to be terminated on 2 November 1999 before the completion of the seven years compulsory service. The learned sessions court judge dismissed Petronas's claim against the defendants with costs on 26 April 2011. Petronas now appealed against that decision.

BRIEF FACTS

**[2]** The appellant, Petronas, on 9 June 1993 offered the first respondent, Cik Khairulniza Md Yasin with a study loan to allow her to further her studies in GCE A Levels and a degree course in the United Kingdom.

**[3]** Cik Khairulniza accepted the offer and a loan agreement ('the said agreement') between Petronas and Cik Khairulniza as the borrower and the second and third respondents as guarantors were signed on 1 July 1993.

**[4]** Clause 15 of the loan agreement states that it was agreed between the parties that the letter of offer dated 9 June 1993 was to be read together with the loan agreement dated 1 July 1993 and that it forms part of the said agreement.

**[5]** The pertinent clause with regards to this suit is cl 3(b) in the said letter of offer at p 132 of the record of appeal ('RR'). By virtue of cl 15 in the said agreement, cl 3(b) in the letter of offer is to be read as part of the said agreement. The said cl 3(b) essentially states that if required by Petronas, the first respondent, Cik Khairulniza Md Yasin must take employment or serve with Petronas or any of its approved agency for a period of seven years, after which event, the study loan will then be converted into a scholarship.

**[6]** After completion of her studies, Petronas offered Cik Khairulniza employment, on a trial basis or on probation of six months, as an executive in its Human Resource Development Department on 15 January 1999. Her employment was to commence on 2 February 1999. The letter of offer of employment is at pp 150–152 of the RR.

**[7]** Cik Khairulniza Md Yassin's employment on a trial basis or on a six month's probation was further extended for another three months, from 2 August 1999–2 November 1999. The letter of extension is dated 1 October 1993 and is at p 167 of the RR. Upon the expiry of the extended probationary period, Petronas alleged that Cik Khairulniza's performance was found to be still unsatisfactory and did not confirm her in her position. As a result Petronas had to terminate Cik Khairulniza Md Yasin's services on 2 November 1999. The letter of termination is at p 179 of the RR.

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**[8]** Cik Khairulniza then filed a claim for reinstatement at the Industrial Court and her claim was dismissed on 31 July 2009. The Industrial Court chairman found that Cik Khairulniza was guilty of poor work performance during her probation and extended probationary period and as such Petronas was justified in not confirming her as she is found to be unsuitable or unfit for such confirmation. The dismissal was thus found to be valid. The award or order of the Industrial Court Chairman is at pp 190–221 of the RR.

**[9]** Petronas then filed a claim against Cik Khairulniza and her two guarantors in the sessions court. Petronas claimed that Cik Khairulniza has not fulfilled cl 3(b) of the letter of offer which is read as part of the loan agreement and thus must repay the loan disbursed for her studies. The amount disbursed under the study loan agreement is RM133,858.53. However since Cik Khairulniza was employed with Petronas for a period of six months, the said period was deducted from the total loan disbursed leaving a balance of RM119,555.84.

SESSIONS COURT JUDGE DECISION

**[10]** The grounds of judgment of the sessions court judge ('the SJ') are at *pp[a0]88 till 92 of the RR*.

**[11]** In brief, the SJ dismissed the appellant's (Petronas's) claim on the following grounds:

(a) there was no breach by Cik Khairulniza of cl 3(b) of the letter of offer when her services were terminated because Cik Khairulniza was always willing to work (p 90 of the RR);

(b) Petronas's claim is barred by limitation (p 91 of the RR); and

(c) Petronas failed to prove that the expenses incurred or the amount disbursed was for the benefit of Cik Khairulniza (p 92 of the RR).

THE PLAINTIFF'S/APPELLANT'S SUBMISSION (PETRONAS)

**[12]** Petronas was represented by Mr Harikanan Ragavan. In brief, Mr Harikanan Ragavan submitted the followings:

(a) the appellant/Petronas maintains that the study loan agreement entered into between parties is a loan agreement and that it will only be converted into a scholarship once Cik Khairulniza has served seven years with Petronas. Since Cik Khairulniza's employment was terminated on 2 November 1999, therefore, the loan remains a loan, and she has an obligation to repay the said loan which was outstanding to Petronas;

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(b) by offering Cik Khairulniza an employment with Petronas, by conduct Petronas had postponed the requirement to repay the loan until the completion of seven years of service with Petronas;

(c) there can be no dispute that by virtue of Cik Khairulniza not completing her seven years of service with Petronas, she has breached cl 3(b) of the letter of offer at p 132 of the RR, read as part of the loan agreement. She thus must repay the loan outstanding. Mr Harikanan Ragavan argued that just because Cik Khairulniza was terminated from her employment it does not mean that she has not breached the terms of the agreement;

(d) the requirement of the employer for an employee to work for seven years before the employee is entitled to convert the employee's loan into a scholarship does not mean that the employer cannot terminate her services for poor performance; and

(e) it must be pointed out that the SJ did hold that Cik Khairulniza is liable to pay the expenses incurred by Petronas. However the SJ held that Petronas failed to prove that the expenses incurred by them were for the benefit of Cik Khairulniza.

THE DEFENDANT'S/RESPONDENT'S SUBMISSION

**[13]** Cik Khairulniza, the borrower of the loan and the two gurantors was represented by Puan Maidzura Mohammed. In brief, Puan Maidzura Mohammed submitted the followings:

(a) the material part of cl 3 of the agreement reads as follows: 'Pinjaman tersebut hendaklah dibayar balik kepada (plaintif) setelah (defendan pertama) mendapat pekerjaan secara tetap atau setelah enam bulan (defendan pertama) menamatkan pengajiannya atau yang mana terdahulu iaitu dengan membayar secara ansuran yang mana ansuran pinjaman tersebut akan ditentukan mengikut budi bicara (plaintif) semata-mata ' (p 142 of the RR).

The translation of cl 3 of the loan agreement is that the loan is required to be paid to Petronas after the borrower has found permanent employment or after six months after completion of her studies, whichever is the earlier; and the loan is to be paid by instalment payments at the sole discretion of Petronas;

(b) the learned SJ correctly held that time began to run from 14 January 1999 (that is six months from 14 July 1998 which is the date Cik Khairulniza completed her studies) and that as the six years period had expired on 13 January 2005, therefore Petronas's claim which was filed on 27 October 2005 was barred by limitation as against the respondents;

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(c) Petronas called PW2 as their witness to give evidence on the amount claimed by them in the statement of claim. The respondents had submitted that the testimony of PW2 should not be accepted because PW2 has admitted that he has no personal knowledge that the total amount expended by Petronas is the amount now claimed by them; and

(d) given the evidence led and the documents produced at trial, it was submitted that Petronas did not establish their case against the respondents and further, that Petronas did not prove the amount claimed by them.

ISSUES TO BE TRIED

**[14]** Whether the borrower has breached cl 3 of the loan agreement dated 1[a0]July 1993. Clause 3 of the loan agreement is to be read with cl 3(b) of the letter of offer according to cl 15 of the loan agreement.

**[15]** Whether the claim by the appellant, Petronas, is barred by limitation.

**[16]** Whether Petronas has proven that the amount claimed was disbursed for the benefit of the borrower, Cik Khairulniza.

DECISION OF THE COURT

*The Law on appeal*

**[17]** It is settled law that an appellate court should be slow to interfere with the decision of a trial judge (*Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124).

**[18]** It is also settled law that the legal burden is on an appellant to satisfy an appellate court that the trial judge has erred in coming to his conclusion. *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 and *Ramamurthi a/l Ramani v Sri Ram & Co (sued as a firm)* [1998] 2 MLJ 744.

**[19]** In the case of *Ong Kim Hai v Kusaini bin Surip* [1984] 2 MLJ 285; [1984] 1 CLJ 310 (Rep); [1984] 2 CLJ 281, the Federal Court in clarifying the powers of the appellate court stated:

> The approach to the exercise of the power available to an appellate court is as stated by Lord Denning MR in *Kerry v Carter* [1969] 1 WLR 1372 where he said:
>
> > I think that the attitude of this court was correctly stated in that case (*Brown v Thompson* [1968] 1 WLR 1003 at p 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Qunitas v National Smelting Board* [1961] 1 WLR 401 at p 409). This court adopts in regard to apportionment the

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same attitude as it does to damages. *We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts*; but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. (Emphasis added.)

Liability

(a) Whether the borrower has breached cl 3 of the loan agreement dated 1[a0]July 1993. Clause 3 of the loan agreement is to be read with cl 3 of the letter of offer as stipulated by cl 15 of the loan agreement; and

(b) whether the claim by the appellant, Petronas is barred by limitation.

**[20]** The two issues above are dealt together and it revolves on the interpretation of cl 3(b) of the letter of offer dated 9 June 1993 and cl 3 of the loan agreement dated 1 July 1993. These two clauses form the crux of this claim.

**[21]** Clause 3(b) of the letter of offer is produced below:

3 SYARAT-SYARAT

Tawaran ini adalah tertakluk kepada syarat-syarat seperti berikut:

(a)

(b) Anda dikehendaki kembali ke Malaysia dengan segera sebaik sahaja tamat pengajian walaupun tempoh kuatkuasa pinjaman pelajaran ini belum tamat *dan jika dikehendaki, akan berkhidmat dengan PETRONAS atau lain-lain agensi yang diluluskan selama 7 tahun. Dalam hal yang demikian, pinjaman pelajaran ini ditukarkan kepada penganugerahan biasiswa.* (Emphasis added.)

**[22]** Clause 3(b) means that the borrower is required to return home to Malaysia immediately upon completion of her studies and if required will have to serve with Petronas or any other agency as approved by Petronas for a period of seven years, after which event, the study loan will then be converted into a scholarship.

**[23]** Clause 3 of the loan agreement dated 1 July 1993 is reproduced below:

*3 Pinjaman tersebut hendaklah dibayar balik kepada PETRONAS setelah PELAJAR mendapat pekerjaan secara tetap atau setelah enam bulan PELAJAR menamatkan pengajiannya atau yang mana terdahulu, iaitu dengan membayar secara ansuran yang mana ansuran pinjaman tersebut akan ditentukan mengikut budibicara PETRONAS semata-mata.* Bayaran bagi ansuran ini kena dibayar pada satu haribulan bagi bulan kedua dari tarikh ia bekerja dan selepas itu bagi setiap satu haribulan sehingga selesai kesemua pinjaman tersebut dengan syarat sentiasa bahawa PETRONAS adalah berhak pada bila-bila masa untuk mengubah cara dan/atau masa atau masa-masa

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bagi membayar balik itu dan meminta pembayaran balik dengan serta merta bagi kesemua pinjaman tersebut atau sebanyak mana yang masih belum dibayar menurut budibicara mutlaknya dan tanpa memberi apa-apa sebab baginya. (Emphasis added.)

**[24]** Clause 3 means that the loan is required to be paid to Petronas after the student has obtained permanent employment or completed her studies, whichever is the earlier; and the loan is to be paid by instalment payments at the sole discretion of Petronas.

**[25]** It must be noted that cl 3(b) of the letter of offer is to be read together with cl 3 of the loan agreement as stipulated by cl 15 of the agreement.

**[26]** The grounds of judgment of the sessions court judge (the SJ) is at pp[a0]88–92 of the RR.

**[27]** In brief, the SJ dismissed the appellant's (Petronas's) claim on the following grounds:

(a) there was no breach by Cik Khairulniza of cl 3(b) of the letter of offer when her service was terminated by Petronas because Cik Khairulniza was always willing to work and complete the seven mandatory years of service as required of her. Her termination was out of her control since Petronas refused to confirm her after her probationary period was extended. Be that as it may, the study loan remains as a loan and it is up to the discretion of Petronas not to convert the loan into a scholarship as long as the criteria of seven years service is not fulfilled. Since the wordings in cl 3(b) of the letter of offer does not state clearly that the study loan need not be paid in the event Cik Khairulniza is terminated, *then the clear provision in the loan agreement requiring the payment of the loan if it is not converted into a scholarship must be followed;* and

(b) Petronas's claim is barred by limitation. That the cause of action against the borrower and the guarantors under cll 3 and 4 of the loan agreement accrues six months after Cik Khairulniza completed her studies. Since she completed her studies on 14 July 1998, then the debt becomes due on 14 January 1999. Consequently the six years for a cause of action to be taken will commenced on 14 January 1999 and expire on 13 January 2005. Since Petronas filed their claim in court on 27 October 2005, the action is time barred.

**[28]** Looking at the SJ's decision as I summarised it; he has made a finding that there was no breach by Cik Khairulniza of cl 3(b) of the letter of offer since she was willing to work and complete the mandatory seven years service with Petronas. The SJ further states that the termination by Petronas was beyond

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Cik Khairulniza's control. Be that as it may, he found that Petronas has the discretion not to convert the loan into a scholarship since the seven years service is not fulfilled and as such the loan remains as a loan and Cik Khairulniza is still obligated to pay under the clear provisions of the loan agreement.

**[29]** The question here then, is whether there was a breach of cl 3 of the loan agreement. From the totality of the SJ's decision it would seem that though he found that Cik Khairulniza did not breach cl 3(b) of the offer letter, he, on the other hand, agreed, that she has breached the loan agreement and as such she has to repay the loan to Petronas.

**[30]** I disagree with the SJ's finding that Cik Khairulniza did not breach cl[a0]3(b) of the offer letter. To me it is clear that by not completing her seven years service to Petronas, she has clearly breached cl 3(b) of the offer letter. In that I am in agreement with Petronas's solicitor, Mr Harikanan Ragavan that it cannot make sense that just because an employer requires an employee to work for seven years to convert her loan into a scholarship, the employer cannot terminate the employee's service for poor performance. The requirement is for Cik Khairulniza to serve Petronas for seven years. That she did not or could not do. And in this case Cik Khairulniza has brought a claim for wrongful dismissal against Petronas in the Industrial Court. The Industrial Court found Cik Khairulniza to be guilty of poor work performance during her probation and extended probationary period and as such Petronas was justified in not confirming her in her position as she is found to be unsuitable and unfit for confirmation and consequently had to be dismissed. The termination was held to be valid and Cik Khairulniza did not appeal against that decision.

**[31]** Thus, in such circumstances, there is a breach of cl 3(b) of the letter of offer in that Cik Khairulniza did not complete her seven years compulsory service. And since cl 3(b) is to be read together with the loan agreement as stipulated by cl 15 of the said agreement, then there is a clear breach of not only cl 3(b) of the offer letter but also a breach of cl 3 of the loan agreement. *As such, the answer to the first issue is in the positive; that the borrower has breached cl 3 of the loan agreement dated 1 July 1993.*

**[32]** *The next issue is whether the claim by Petronas is time barred.* The respondents submitted that Petronas's claim is time barred under s 6 of the Limitation Act 1953 (Act 254). Petronas claimed otherwise. There are two dates proposed where the cause of action should have accrued or commenced: that is six months from the date Cik Khairulniza completed her studies on 14 July 1998, which is 14 January 1999 and the date Cik Khairulniza was terminated from the employment of Petronas which is on 2 November 1999. According to the respondents, the cause of action commenced on 14 January 1999. Petronas argued that it commenced on 2 November 1999. The pertinent

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question then, is, when did the cause of action arises or commence.

**[33]** Section 6(1)(a) of the Limitation Act 1953 (Act 254) provides that:

> *Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the course of action accrued, that is to say:*
>
> *(a) actions founded on a contract* or on tort

**[34]** In the case of *Nasri v Mesah* [1971] 1 MLJ 32, the Federal Court held at p 34, right column, paras B to F:

> *A 'cause of action' is the entire set of facts that give rise to an enforceable claim*, the phrase comprises every fact which, it traversed, the plaintiff must prove in order o obtain judgment (per Lord Esher MR in *Read v Brown*). In *Reeves v Butcher* Lindley LJ said:
>
> > This expression, 'Cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* decided in 1843, *that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events: but it has always been held that the statute runs from the earliest time at which an action could be brought.*
>
> In *Board of Trade v Cayzer, Irvine & Co* Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. *In other words, cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from the breach* (per Field[a0]J in *Gibbs v Guild*) (Emphasis added)

(Refer also to cases: *Sime Hok Sdn Bhd v Soh Poh Sheng* [2009] MLJU 774; [2009] 9 CLJ 848 and *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 848).

**[35]** Back to our instant case. According to the learned SJ the claim by Petronas is time barred. He has interpreted cl 3 of the agreement and made a finding that the six years period for a claim to be made commenced from 14 January 1999, that is six months after the completion of Cik Khairulniza's studies which is on 14 July 1998. He opined that since there was no evidence that Cik Khairulniza was ever permanently employed and that her employment with Petronas was on a probationary basis, thus the six months period after completion of her studies would form the basis for the calculation of the commencement of the cause of action (p 91 of the RR). Consequently the six years for a cause of action to be taken will commenced on 14 January 1999 and expired on 13 January 2005. Since Petronas filed their claim in court on 27 October 2005, the action is time barred.

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**[36]** It must be noted that when the learned SJ made his calculation on the date the repayment for the loan became due (cause of action accrues) under cl[a0]3 of the agreement, he completely ignored the fact that Cik Khairulniza was employed by Petronas. He went on a literal interpretation of cl 3 of the agreement that the employment must be permanent and not probationary employment before it can be considered for the calculation of time. He completely ignored cl 3(b) of the offer letter which is part and parcel of the agreement by virtue of cl 15 of the agreement. Clause 15 of the agreement states:

> 15. Adalah dengan ini dipersetujui dan diakui bahawa Surat Tawaran Pinjaman pelajar bertarikh dan apa-apa tambahan atau pindaan kepadanya hendaklah dibaca bersama dan menjadi sebahagian daripada perjanjian ini.

**[37]** Clause 15, translated means that it has been agreed and affirmed that the offer letter for a loan to the student and any addition or amendment to it is to be read together and form part of this agreement.

**[38]** Thus the fact that Cik Khairulniza was employed by Petronas, though on a probationary basis, must be taken into consideration for the computation of time as to when a cause of action is accrued. It cannot be completely ignored, for to do so, would run counter to the clear provisions of the loan agreement.

**[39]** In the case of *Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248 at pp 262–263, it was held:

> Words are construed, in their grammatical and ordinary sense, unless that would lead to some absurdity, or some repugnance or inconsistencies with the rest of the instrument, in which case the grammatical and ordinary sense may be modified, so as to avoid that absurdity and inconsistency.

**[40]** Therefore cl 3 of the agreement has to be construed by taking into account cl 3(b) of the offer letter, and the circumstances of the case, to avoid absurdity and inconsistency. Thus when Petronas employed Cik Khairulniza and required her to serve Petronas for seven years to enable the loan to be converted into a scholarship, Petronas has essentially postponed Cik Khairulniza's obligation to repay her loan under cl 3 of the agreement. When she was not confirmed in her position in Petronas due to poor work performance and consequently terminated on 2 November 1999, she could not complete the seven years service required of her to convert the loan into a scholarship. At this point of time, 2 November 1999, the breach occurred and the repayment of the loan became due under cl 3 of the agreement. Therefore the six years limitation period should commenced on 2 November 1999 and end six years later on 1 November 2005. Since Petronas's claim was filed on 27 October 2005, it was still within time and not barred by the six years

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limitation. *Thus the answer to the second issue is in the negative; that the claim by the appellant, Petronas, is not barred by limitation.*

Quantum

(a) Whether Petronas has proven that the amount claimed was disbursed for the benefit of the borrower, Cik Khairulniza.

**[41]** The third issue which is the appeal on quantum can be allowed based on the following grounds:

(a) Cik Khairulniza had admitted that Petronas paid for her studies in the United Kingdom ('UK'). She also admitted that Petronas paid for her studies when she did her A Levels (p 125 of the RR at Qs 22 to Q25). In the UK, Petronas paid for her studies in her second and third years (p 125 of the RR). She also admitted that Petronas paid for her maintenance during the second and third years in UK (p 125 of the RR);

(b) the respondents disputed the spreadsheet showing the breakdown of expenses incurred by Petronas for Cik Khairulniza at p 225 of the RR which reflects the amount disbursed for her benefit. However the learned SJ agreed during trial that the said document be tendered as evidence *and marked it as P1*, subject to the weight to be attached being determined after the trial;

(c) by virtue of the evidence adduced during the trial, the weight to be attached must be the highest weight for the following reasons:

(i) the document was printed from the computer by SP2 himself;

(ii) although Cik Khairulniza disputed the contents, she admitted that Petronas paid for her studies for her A Levels for the period between 1993–1995 (p 125 of the RR);

(iii) at p 125 of the RR, it is clear that monies were disbursed pursuant to the loan agreement for and on behalf of Cik Khairulniza for the period until 25 October 1995;

(iv) there is a gap in the schedule of payments between 5 October 1995–15 August 1996. When cross-examined, Cik Khairulniza admitted that this was the period when she studied in her first year in the degree course and that she paid for her own education (p 125 of the RR at Q25);

(v) the fact that the schedule of payments, *P1, exhibited at p 225 of the RR*, clearly showed that there were no monies disbursed by Petronas during the same period that Cik Khairulniza paid for her own education, indicates clearly that p 225 of the RR is a reliable document;

(vi) Cik Khairulniza also admitted during cross-examination that the

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tuition fees in UK were also paid by Petronas (p 125 of the RR at Q23);

(vii) the document at p 225 of the RR, P1, was given to the respondents and her solicitor in June 2010;

(viii) Cik Khairulniza claimed that she checked the document but did not complain to Petronas that the figures were incorrect;

(ix) thus the defence that the figures were incorrect cannot be accepted because Cik Khairulniza has not shown any proof that the figures shown and exhibited by Petronas is incorrect;

(x) the burden is on Petronas to show that the amount has been expended. That burden has been discharged when p 225 of the RR was accepted as evidence by the learned SJ and marked as P1; and

(xi) the burden then shifted to the respondents to show the figures were incorrect.

(d) p 225 of the RR has been accepted as evidence. Therefore the only way the weight to be attached can be reduced or completely minimised is if Cik Khairulniza can prove that the figures were incorrect. *This, she failed to do*; and

(e) thus the learned SJ erred when he held that Petronas had failed to prove the expenses incurred by them for the benefit of Cik Khairulniza. *Thus the answer to the third issue is in the positive; that Petronas has proven that the amount claimed was disbursed for the benefit of the borrower, Cik Khairulniza.*

## CONCLUSION

**[42]** In this appeal, though the decision of the learned SJ was partly correct when he found the respondents/Cik Khairulniza and the guarantors to be in breach of the loan agreement; he erred when he found the appellant/Petronas's claim to be time barred and the amount disbursed by Petronas for the benefit of Cik Khairulniza were not proven. I am satisfied that Petronas has proven its claim on the balance of probabilities and that the learned SJ has erred in coming to his conclusion. As such the appeal is allowed and the decision of the learned SJ is set aside.

*Appeal allowed.*

Reported by Afiq Mohamad Noor